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Richard F. Hamm

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# MOBILIZING LEGAL TALENT FOR A CAUSE: THE NATIONAL WOMAN'S PARTY AND THE CAMPAIGN TO MAKE JURY SERVICE FOR WOMEN A FEDERAL RIGHT

RICHARD F. HAMM\*

## INTRODUCTION

This Essay explores how the National Woman's Party mobilized legal talent during its campaign in the 1930s to make jury service for women a Federal right. First, I will begin with a brief overview of the National Woman's Party, its nature, its programs, and its key legal personnel. Second, I will describe the state of the law concerning jury service for women after the Nineteenth Amendment, and will explore the strategy that the party followed in trying to gain women the equal right to serve on juries. Third, I will describe the three cases in which the party involved itself during the 1930s, relating them to the legal and other goals of the organization and showing how the organization was forced to rely on its own legal resources in pressing its jury service cases.<sup>1</sup> Fourth and finally, I will conclude by exploring the importance of internal counsel to this litigation campaign.<sup>2</sup>

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\* Associate Professor of History and Public Policy, University of Albany, State University of New York. B.A. in History, Florida Atlantic University. M.A. in American History, Ohio State University. Ph.D. in American History, University of Virginia.

1. See *Commonwealth v. Welosky*, 177 N.E. 656 (Mass. 1931) (denying women the right to serve on juries); see also Microfiche, *infra* note 17, *Telegraph from Sarah Pell* (Jan. 15, 1932, NWPP, Series I, Group I, Box 28) (discussing the *Fortescue* case which deals with a woman on trial for murder before a jury of only men); *Maxell v. Commonwealth*, 187 S.E. 5067 (Va. 1936) (overturning a woman's conviction, but not because she was on trial before an all male jury).

2. See Joan G. Zimmerman, *The Jurisprudence of Equality: the Women's Minimum Wage, the First Equal Rights Amendment, and Adkins v. Children's Hospital, 1905-1923*, in *JOURNAL OF AM. HISTORY* 78 (1991) (discussing the National Woman's Party's use of legal counsel).

## BACKGROUND

The National Woman's Party was born of a dispute over means among American feminists as to how to achieve suffrage for women. In 1913, Alice Paul led her supporters out of the National American Woman Suffrage Association, and into a new organization eventually called the National Woman's Party. Paul's supporters were unhappy with the earlier organization's determination to bring about women's suffrage through a state-by-state process.<sup>3</sup> Embracing the militant tactics of the British suffragettes, the party protested and lobbied for a national women's suffrage amendment.<sup>4</sup> Following the ratification of the Nineteenth Amendment, the National Woman's Party turned its attention to bringing about full, equal rights for women through an equal rights amendment.<sup>5</sup> The first such amendment was drafted by Alice Paul, after consultation with many legal experts and reformers, and introduced into Congress, by a friendly legislator, in 1923. For the next fifty years, party-sponsored equal rights amendments would be introduced into every Congress.<sup>6</sup>

In some ways, the very name of the National Woman's Party was a misnomer. The organization was never really a party per se, but rather a non-partisan, political lobbying group. It was not really a national organization either, as it was never very large. At its largest point, before national suffrage, the party was 60,000 strong.<sup>7</sup> It was

3. See Martha Craig Daughtrey, *Women and the Constitution: Where We Are at the End of the Century*, 75 N.Y.U. L. REV. 1, 5 (2000) (describing failures of the National American Woman Suffrage Association's leadership to effect change on a state-by-state basis); see also Omi Leissner, *Naming the Unheard Of*, 15 NAT'L BLACK L.J. 109, 153 n.176 (1997-98) (referring to the National American Woman Suffrage Association as "an aggressive all-women organization"); LINDA G. FORD, *IRON-JAWED ANGELS* 22 (Univ. Press of Am., Inc. 1991) ("... most of NAWSA's membership, not only were militant, but were not all interested in pressing for an immediate federal amendment. They simply continued, as NAWSA always had, the exhausting battle for women suffrage on the state and local levels.").

4. See Paula F. Casey, *Tennessee's Vote for Women Decided the Nation: The Final Battle*, 31 OCT. TENN. B. J. 20, 23-24 (1995) (explaining that Alice Paul had "been active in the British suffrage movement, which stressed holding 'the party in power responsible' for the amendment's fate"); *id.* at 21 (describing the highly original, militant tactics employed by suffragists, including White House pickets and hunger strikes).

5. See Ronnie L. Podolefsky, *The Illusion of Suffrage: Female Voting Rights and the Women's Poll Tax Repeal Movement After the Nineteenth Amendment*, 7 COLUM. J. GENDER & L. 185, 237 n.7 (1998) (stating that the National Woman's Party dedicated itself to passage of the Equal Rights Amendment after ratification of the Nineteenth Amendment).

6. See Ruth Bader Ginsburg & Laura W. Brill, *Women in the Federal Judiciary: Three Way Pavers and the Exhilarating Change President Carter Wrought*, 64 FORDHAM L. REV. 281, 284 (1995) (stating that the National Woman's Party was "responsible for introducing in 1923 the idea and original text of an equal rights amendment."); see also Daughtrey, *supra* note 3, at 6 (describing the introduction and long subsequent history of the Equal Rights Amendment).

7. See Janice L. Richter, *We Have Waited So Long: The Story of Alice Paul*, 171-SEP. N.J. LAW. 25, 26 (1995) (recounting Alice Paul's meteoric rise among feminists and suffragists, marked by her success in organizing a party with fifty thousand members and nearly one million dollars of

organized into state branches that were theoretically autonomous, and a national branch which tried to run the whole organization from top to bottom.

The ideas of the National Woman's Party also stood in strong contrast to the dominant views of most American feminists. It is important to remember that in the 1920s and 1930s, most American women's organizations opposed an equal rights amendment, on the grounds that it would invalidate state and federal legislation regulating women's labor, and opposed the organization that championed the equal rights amendment.<sup>8</sup> At the same time, however, other organizations with shared goals often cooperated with the National Woman's Party. The party also drew in supporters through its focused ideology (an unadulterated feminist/egalitarian ideology focused on rights), strong leadership (it remained for much of its life the extension of Alice Paul), and its ability to generate headlines and public interest, despite its small numbers and limited nature.<sup>9</sup> And in those years, the equal rights amendment was central to the party's activities.<sup>10</sup>

Beyond seeking an equal rights amendment, the National Woman's Party concentrated on other issues in different venues which also would advance its central goal: full political, civil, and legal equality of the sexes.<sup>11</sup> At the national and international level, the party became involved in efforts to improve the status of women.<sup>12</sup>

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funds).

8. See Susan L. Waysdorf, *The Sesquicentennial of the 1848 Seneca Falls Women's Rights Convention: American Women's Unfinished Quest for Legal, Economic, Political and Social Equality*, 84 KY. L.J. 745, 804 (1995-96) (explaining that the aggregated "goals of the Progressive Era leaders, the Women's Suffrage Movement and the social feminist reformers generally had been based in equality and social justice ideologies.").

9. See Richter, *supra* note 7, at 26 (explaining that the National Woman's Party suffrage campaign was extraordinarily swift, intensive, and compelling, to the point that it often pushed coverage of World War I off its customary spot on the front pages of newspapers); see also Sandra Day O'Connor, *The History of the Women's Suffrage Movement*, 49 VAND. L. REV. 657, 666 (1996) (describing an incident during a speech by President Wilson when a National Woman's Party member displayed a banner with an aggressive pro-suffrage message and women distributed leaflets about the cause to the media).

10. See NANCY F. COTT, *THE GROUNDING OF MODERN FEMINISM* 125 (Yale Univ. Press 1987) (noting that at the Party's conference commemorating Stanton's Declaration of Sentiments, the Party announced the need for equality for women in the form of an amendment).

11. See *id.* at 21 (explaining that some members of the National Woman's Party regarded sex-based legislation as a form of sex discrimination, and that Paul increasingly heeded their opinions); see also Ginsburg & Brill, *supra* note 6, at 284-85 (describing how the Woman's Party urged legislators to repeal "protective labor laws that applied only to women" and other laws that restricted women's opportunities).

12. See *id.* at 76 (noting that in the National Woman's Party's view, the 'primary antagonism' is that between men and women which goes beyond any conflict based on class, nationality or race).

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For much of the 1920s and 1930s, it worked to make changes in American (and later all nations') nationality law, to eliminate discrimination against women (until 1922, an American woman who married an alien lost her United States nationality).<sup>13</sup> Also in the 1930s, the party successfully worked to repeal a 1932 federal law that prohibited federal employees from working for the government when their spouses (meaning husbands) were also government employees. The party's efforts culminated in helping to organize this law's repeal in 1937.<sup>14</sup> The party was also active at the state level. In the early 1920s it ran several state campaigns calling for state equal rights amendments.<sup>15</sup> Also, it drafted legislation for local and state governments, addressing such issues as custody rights of children, property rights, the reinstatement of maiden names after marriage, divorce rights, estate administration, guardianship rights, contract powers, civil liability, and jury service.<sup>16</sup> The party claimed that about half of the six hundred bills it authored were adopted.<sup>17</sup>

The party was led by the national council, while its secretary coordinated much of the day-to-day activities with local branch officers.<sup>18</sup> A number of lawyers were central to the council's activities in the 1930s.<sup>19</sup> Alice Paul, who had become a lawyer after attending

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13. See BREDBENNER, *infra* note 17 (noting the significance of the Cable Act and its ramifications).

14. See COTT, *supra* note 10, at 186 (noting that judges favored marriage over married women's labor rights as a policy issue).

15. See COTT, *supra* note 10, at 120-21 (recognizing that the National Woman's Party put in place the first equal rights bill in Wisconsin, in 1921).

16. See COTT, *supra* note 10, at 97 (stating that women's leaders of the period developed great, practical legislative know-how during the suffrage movement and applied that to state legislatures and Capitol Hill).

17. For the National Woman's Party see CHRISTINE A. LUNARDINI, FROM EQUAL SUFFRAGE TO EQUAL RIGHTS: ALICE PAUL AND THE NATIONAL WOMAN'S PARTY, 1910-1928 (New York: N.Y. Univ. Press 1986); SUSAN D. BECKER, THE ORIGINS OF THE EQUAL RIGHTS AMENDMENT: AMERICAN FEMINISM BETWEEN THE WARS (Westport: Greenwood Press 1981); AILEEN S. KRADITOR, IDEAS OF THE WOMAN SUFFRAGE MOVEMENT, 1890-1920 (New York: Columbia University Press 1965), 219-248; LINDA G. FORD, IRON-JAWED ANGELS: THE SUFFRAGE MILITANCY OF THE NATIONAL WOMAN'S PARTY, 1912-1920 (Lanham: Univ. Press of Am., 1991); JOAN G. ZIMMERMAN, *The Jurisprudence of Equality: The Women's Minimum Wage, the first Equal Rights Amendment, and Adkins v. Children's Hospital, 1905-1923*, J. AM. HIST. 78 (1991), 188-225; CANDICE LEWIS BREDBENNER, A NATIONALITY OF HER OWN: WOMEN, MARRIAGE, AND THE LAW OF CITIZENSHIP (Berkeley: Univ. of Cal. Press 1998); and, THE NATIONAL WOMAN'S PARTY PAPERS, 1913-1974, stored at the United States Library of Congress, Manuscripts Division, available in microform and microfiche formats [hereinafter NWPP]. See also THE NATIONAL WOMAN'S PARTY PAPERS, 1913-1974: A GUIDE TO THE MICROFILM EDITION (SANFORD, NC: MICROFILMING CO. OF AM. (Thomas C. Pardo, ed.)).

18. See NWPP, *supra* note 17, *Brief Biographic Sketch of Greathouse* (Series 1, Group 2, box 92) (noting Greathouse's position as Secretary).

19. See Zimmerman, *supra* note 2, at 78 (stating that both men and women served as legal counsel for the party).

the Washington College of Law, served on the council, but her influence was relatively muted as she spent much of the 1930s abroad.<sup>20</sup> Burnita Matthews, as chair of the party's lawyers' councils and member of the national council, was very important. Matthews, who taught at the Washington College of Law, usually acted "as counsel for the Woman's Party, both in and out of court."<sup>21</sup> Matthews also drafted the District of Columbia law allowing women to serve on juries.<sup>22</sup> Laura Berrien (who also was very active in the National Association of Women Lawyers) practiced with Matthews and Rebekah Greathouse, another party member and Washington College of Law faculty member.<sup>23</sup> A former United States Attorney, Greathouse, focused much of her work on a campaign to establish women's right to independent nationality.<sup>24</sup> These lawyers, along with Presidents of the councils Anna Wiley (1929-1932), Florence Hilles (1933-1936), and Sarah Pell (1936-1939), shaped the strategy of the party.<sup>25</sup> Muna Lee, the director of national activities for much of the 1930s, coordinated the activities of the national organizations with state branch officers like Alma Lutz of Massachusetts and Elsie Graff of Virginia.<sup>26</sup>

20. See SUSAN D. BECKER, *THE ORIGINS OF THE EQUAL RIGHTS AMENDMENT 29-30* (Greenwood Press 1981) (explaining that Alice Paul lived in Europe during most of the 1930s while she worked with other women's groups in an effort to create a World Women's Party).

21. Selma Moidel Smith, *Women Lawyers: A Century of Achievement*, 9-FALL EXPERIENCE 6, 9 (1998)

22. See *id.* at 6, 9 (describing the academic and professional achievements of Judge Burnita Stellan Matthews).

23. See Mary L. Clark, *The Founding of the Washington College of Law: The First Law School Established By Women For Women*, 47 AM. U. L. REV. 613, 676 n.313 (1998) (stating that Burnita Matthews had an all female law practice with Berrien and Greathouse).

24. See NWPP, *supra* note 17, *Brief Biographic Sketch of Greathouse* (Series 1, Group 2, Box 92) (noting Greathouse's actions as Secretary of the National Woman's Party).

25. See NWPP, *supra* note 17, *Brief Biographic Sketch of Wiley*; *Brief Biographic Sketch of Hilles*; *Brief Biographic Sketch of Pell*, all found in Series 1, Group 2, Box 92.

26. See Zimmerman, *supra* note 2, at 202, 217 & 223 (noting the need of the National Woman's Party for lawyers and their interest in ending common law discrimination against women); see also COTT, *supra* note 10, at 56-7, and 79-81; BECKER, *supra* note 17, at 18-19, 37, 103. See NWPP, *supra* note 17, *Brief Biographic Sketch of Burnita Shelton Matthews* (Series I, Group 2, Box 92) (noting Ms. Matthews was the first woman to serve as judge in a U.S. district court); NWPP, *supra* note 17, *Brief Biographic Sketch of Berrien* (Series I, Group 2, Box 92) (noting that Ms. Berrien was the Vice President of the National Association of Women Lawyers); NWPP, *supra* note 17, *Brief Biographic Sketch of Greathouse* (Series I, Group 2, Box 92) (noting Greathouse's work as Secretary of the National Women's Party). See Christine L. Wade, *Burnita Shelton Matthews: The Biography of a Pioneering Woman, Lawyer and Feminist, 1894-1988*, *Women's Legal History Biography Project* (visited July 10, 2000) <http://www.stanford.edu/group/WLHP/papers/burnita.html> at 5 (noting that Burnita Shelton Matthews, a lawyer for the National Woman's Party, focused the majority of her attention on the issues of jury service and workplace legislation).

#### JURY SERVICE FOR WOMEN AFTER THE NINETEENTH AMENDMENT

Most observers assumed that the passage of the 1920 Women's Suffrage Amendment would automatically enable women to serve on juries.<sup>27</sup> In many cases that was exactly the progression. But, at the opening of the depression decade, ten years after the Nineteenth Amendment, only about half the states allowed women to serve on juries.<sup>28</sup> Rural southern states like Virginia and populous urban states like Massachusetts all denied women the right to serve on juries.<sup>29</sup> The party thought that a National Equal Rights Amendment would bring about full legal equality of women and men, insuring women the right to serve on juries across the nation.<sup>30</sup> The party also cooperated with other organizations in attempting bring about jury service for women through state legislation.<sup>31</sup> Some of the states where the party sought such legislation in the 1930s included New York, Massachusetts, Maryland, and Virginia.<sup>32</sup>

#### THE NATIONAL WOMAN'S PARTY'S USE OF INTERNAL LEGAL RESOURCES IN LITIGATION

After a decade of trying to use legislation to bring jury service to women through a state by state approach, the National Woman's Party, when the opportunity arose, undertook a litigation campaign to make jury service a federal right, as an adjunct to its other activities

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27. See LINDA K. KERBER, *NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZENSHIP* 137 (New York: Hill & Wang 1998) (noting that in many states, jury service followed the 19th amendment, but in other states, men mobilized to prevent it).

28. See *id.* at 136 (noting that some of the arguments used against allowing women on juries were that women do not 'belong' in the courtroom, that women are too frivolous to take matters seriously, and that women take matters too seriously). But see Carol Weisbrod, *Images of the Woman Juror*, 9 HARV. WOMEN'S L.J. 59, 71 (1986) (presenting arguments used for allowing women to be on juries, such as women being more perceptive than men and women being able to understand other women better than men); cf. Barbara Allen Babcock, *A Place in the Palladium: Women's Rights and Jury Service*, 61 U. CIN. L. REV. 1139, 1139 (1993) (arguing that when a group is removed from jury service, the effect is the removal of qualities of human nature and variety of experience).

29. See KERBER, *supra* note 27, at 139 (stating that by 1923, eighteen states plus Alaska allowed women on juries, but in those states which did not, legislative and legal battles followed).

30. See COTT, *supra* note 10, at 121 (noting that the NWP sought to have equality, such that men and women were treated equally by the laws).

31. See KERBER, *supra* note 27, at 137-39 (noting that efforts by the National Woman's Party led to a number of states creating statutes allowing women on juries, however most states provided an exemption for women not willing to serve).

32. See KERBER, *supra* note 27, at 142 (noting that a New York law was created to allow women to serve on juries on the same terms as men, but they could claim exemption by filing an affidavit), & 143 (stating that the Massachusetts Supreme Court indicated the need for a new statute regarding jury selection).

on this topic.<sup>33</sup> At this point, the judicial interpretation of the Fifteenth Amendment was the Party's preferred model. The Nineteenth Amendment was a copy of the earlier amendment, merely replacing the language of "race, color or previous condition of servitude"<sup>34</sup> with the word "sex."<sup>35</sup> Long before the Nineteenth Amendment's adoption, the United States Supreme Court ruled, in the 1881 case, *Neal v. Delaware*,<sup>36</sup> that the Fifteenth Amendment rendered inoperative provisions in state laws which restricted the right of suffrage and thus state legislation prescribing the "qualification of jurors, was itself, enlarged in its operation to embrace all . . . qualified to vote."<sup>37</sup> The basic National Woman's Party position in the 1930s was that similar construction of the Nineteenth Amendment would allow women the right to serve on juries.<sup>38</sup>

In 1931, the Massachusetts branch of the Party, put these ideas in action in the case of a Boston bootlegger, Genevieve Welosky.<sup>39</sup> The decision to launch a test case came during a two year period in which the branch had hired paid organizers to increase membership, seek more publicity, and to monitor the legislature to ensure "that no legislation discriminating against women was passed."<sup>40</sup> At this juncture the branch tried "something more militant:" finding a jury service test case. This was the idea of one member—Lois Rantoul—"who for years had worked for jury service with other women's organizations" through the "too monotonous and too humiliating" process of introducing bill after bill in the legislatures.<sup>41</sup>

Welosky was convicted of the crime of keeping and selling liquor in violation of the state prohibition law by a jury composed entirely of men.<sup>42</sup> The Massachusetts 1920 Jury Service Law declared, "[a] person qualified to vote for representatives to the general court shall

33. See KERBER, *supra* note 27, at 658.

34. See U.S. CONST. amend. IV, § 1 (forbidding the denial of voting based on 'race, color, or previous conditions of servitude.').

35. See U.S. CONST. amend. XIX, § 1 (forbidding the denial of voting rights based on sex).

36. 103 U.S. 370, 386 (1881).

37. *Id.* at 389.

38. See *Commonwealth v. Welosky*, 177 N.E. 656 (Mass. 1931).

39. See *Welosky*, 177 N.E. at 658 (noting that the challenge was based on the fact that there were no women on the list from which the jury was selected).

40. NWPP, *supra* note 17, *Letter From Matthews to Roever & Report of Massachusetts in Dec. 5-7, 1931 Biennial Conference Reports* (Series I, Group 2, Box 81).

41. See *Commonwealth v. Welosky*, 177 N.E. 656 (Mass. 1931); see also NWPP, *supra* note 17, *Letter from Alma Lutz & Report of Massachusetts in Dec 5-7 1931 Biennial Conference Reports* (Series I, Group 2, Box 81).

42. See *Welosky*, 177 N.E. at 658.



be liable to serve as a juror.”<sup>43</sup> But Massachusetts practice maintained that only men be chosen for jury service. Through a Boston attorney, George Roewer, the Massachusetts branch learned of the case. It decided to bring up a jury service case, with the guarded support of the National Woman’s Party.<sup>44</sup>

Roewer was a strong supporter of women’s rights and he had worked with the party in the past, especially during the suffrage campaign.<sup>45</sup> His involvement in the case is best seen as something akin to the relationship that the NAACP had with local lawyers before the creation of the Inc. Fund.<sup>46</sup> His relationship with the party was ad hoc and required the coordination of both the national headquarters and local chapter to function effectively.<sup>47</sup> In short, Roewer’s providing of legal talent worked no better than the similar arrangements of the NAACP.<sup>48</sup>

The national conference had real doubts about this course of action, but also saw that the test case fit with the party’s other activities.<sup>49</sup> It generally believed that “a favorable decision could not be obtained in Massachusetts.”<sup>50</sup> However, the national conference gave the go

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43. *Id.*

44. See NWPP, *supra* note 17, *Letter from Matthews to Roewer* (Nov. 23, 1931, Series I, Group 2, Box 81). Thus on March 13, 1931, during the regional conferences, “Mrs. Rantoul spoke on the Jury service case being carried on the Massachusetts Branch.” NWPP, *supra* note 17, *Regional Conference of the National Woman’s Party, March 12 and 13, 1931, Copley-Plaza Hotel, Boston, Massachusetts* (Series I, Group 2, Box 82).

45. See NWPP, *supra* note 17, *Letter from Matthews to Lutz* (Oct. 9, 1931, Series I, Group 2, Box 80) (noting that Roewer might be helpful in the current campaign based on his help in the earlier campaign for suffrage).

46. See August Meier & Elliot Rudwick, *Attorneys Black and White: A Case Study of Race Relations Within the NAACP*, 62 J. OF AM. HIST. 913, 915 (1976) (noting that prior to 1930 the majority of the NAACP’s legal work was conducted by white attorneys).

47. See NWPP, *supra* note 17, *Letter from Matthews to Lutz* (Oct. 9, 1931, Series I, Group 2, Box 80) (referencing Roewer’s work with the party, generally).

48. See MARK V. TUSHNET, *THE NAACPs LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950*, 34-48 (Univ. of N.C. Press 1987); see also RICHARD KLUGER, *SIMPLE JUSTICE*, 98 (Vintage Books 1975) (recounting an incident where the NAACP conference presented mainly by white people led attending black militants to be suspicious); GENNA RAE MCNEIL, *GROUNDWORK: CHARLES HAMILTON HOUSTON: SOCIAL ENGINEER FOR CIVIL RIGHTS*, 101-102 (Univ. of Illinois Press 1983) (conveying an instance where an NAACP speaker, Charles Houston, spoke of uniting the black movement with the poor white, at was criticized for retreating from their cause, leading to a rejection of this concept by the NAACP); DAN T. CARTER, *SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH* 102 (Louisiana St. Univ. Press 1988) (1994) (recounting that the NAACP’s cooperation with the International Labor Defense, a communist organization, in the Scotsboro case, eventually failed, ending in the NAACP withdrawing from the case).

49. See NWPP, *supra* note 17, *Letter from Matthews to Paul* (Jan. 11, 1932, Series I, Group 2, Box 81) (noting that the case could increase the Party’s publicity and give them a forum to present their constitutional challenges to the public).

50. See NWPP, *supra* note 17, *Letter from Matthews to Roewer* (Nov. 23, 1931, Series I, Group 2, Box 81).

ahead to the state branch if the case was deemed “worthwhile from the standpoint of publicity.”<sup>51</sup> Moreover, as other women’s organizations shared the goal of gaining jury service for women, the national conference saw it as an opportunity to strengthen ties with the other groups.<sup>52</sup>

Working through Roewer, the Massachusetts Branch (with the assistance of the Massachusetts League of Women Voters) appealed the Welosky case to the Supreme Judicial Court of Massachusetts.<sup>53</sup> Most of their argument focused on the construction of the words “a person qualified to vote,” which they construed to include women.<sup>54</sup> A weaker part of their brief focused on the Federal issue, using the analogy of the Fifteenth and Nineteenth Amendments, the Party alleged that by being tried by a jury “chosen from a list from which members of her own sex were excluded” denied Welosky equal protection of the law under the Fourteenth Amendment.<sup>55</sup>

The Massachusetts court rejected the argument concerning the interpretation of the statute<sup>56</sup> and the federal constitutional argument on equal protection of the law.<sup>57</sup> In an opinion written by Chief Justice Rugg, the court argued that the words “a person” in the Massachusetts jury service (which was passed after the Nineteenth Amendment went into effect) was a “re-enactment of a long line of statutes.”<sup>58</sup> The earlier statutes used person to mean man, and so must the 1920 law, as the legislature had changed the words concerning suffrage but not jury service in the same session.<sup>59</sup> Moreover, Rugg asserted that the appeal to the Federal constitutional

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51. NWPP, *supra* note 17, *Letter from Matthews to Roewer* (Nov. 23, 1931, Series I, Group 2, Box 81).

52. *See* NWPP, *supra* note 17, *Letter from Matthews to Roewer* (Nov. 23, 1931, Series I, Group 2, Box 81) (noting the attempts made to join other groups such as the League of Women Voters).

53. *See* Pardo, book reference guide, *supra* note 17, at 50 (appealing on the grounds that Genevieve Welosky had been denied a fair trial by a jury of her peers, namely women).

54. *Welosky*, 177 N.E. at 402 (arguing (1) the phrase of the statute is general and thus was intended to automatically include women if their constitutional inhibitions were ever removed, and (2) since the General Laws were enacted in December, 1920, after ratification of the nineteenth amendment, that statute was intended to include women).

55. *See Welosky*, 177 N.E. at 411-12 (stating that by reason of the exclusion of women from the jury list, Welosky has been denied equal protection of the laws).

56. *See Welosky*, 177 N.E. at 401 (rejecting proposition that the Massachusetts jury statute requires women to serve on juries).

57. *See id.* at 416 (holding that excluding women from juries does not violate the Equal Protection Clause).

58. *Id.* at 406.

59. *See id.* (explaining that the word “person” in jury statutes had historically meant “man,” thus “person” in these statutes refers only to men).

rights had no merit.<sup>60</sup>

After the defeat, the national conference weighed the pros and cons of appealing the case to the United States Supreme Court.<sup>61</sup> On the negative side were the daunting tasks of financing and winning the appeal.<sup>62</sup> Matthews advised against it: “because the unfavorable decision heretofore rendered by that Court regarding women seem to me to preclude the probability of a satisfactory outcome.”<sup>63</sup> Indeed, Roewer doubted whether the case was “in shape” for an appeal.<sup>64</sup> Moreover, the potential appeal to the United States Supreme Court came at time of when, thanks to the depression, the party’s finances were tight.<sup>65</sup> Its treasury was “depressingly low.”<sup>66</sup> On the plus side were the same forces that had operated to bring the case to the Massachusetts high court: the chance to keep the issue of jury service and equal rights before the public and opportunity to strengthen ties with other women’s organizations.<sup>67</sup>

While Paul and the leaders of the party “thought that it would be splendid to take the case to the United State Supreme Court,” they did so on the terms designed to advance the party’s extra-legal goals.<sup>68</sup> At the September 24, 1931 meeting, the Council, under the direction

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60. *Welosky*, 177 N.E. at 416 (rejecting argument that women have a constitutional right under the Equal Protection Amendment, to serve on juries).

61. See Pardo, book reference guide, *supra* note 17, at 50 (stating that the Party felt a favorable ruling from the U.S. Supreme Court would not only fix the injustice done to Genevieve Welosky, but the impact of the interpretation would also nullify many state laws prohibiting women from serving on juries).

62. See NWPP, *supra* note 17, *Letter from Alma Lutz to Matthews* (Sept. 12, 1931, Series I, Group 2, Box 80) (stating that the Massachusetts Committee may not finance an appeal to the Supreme Court); see also NWPP, *supra* note 17, *Letter from Alma Lutz to Mrs. Harvey Wiley* (Sept. 15, 1931, Series I, Group 2, Box 80).

63. See NWPP, *supra* note 17, *Letter from Matthews to George R. Roewer* (Nov. 23, 1931, Series I, Group 2, Box 81) (stating that Matthews made such a statement to Ms. Lutz in earlier correspondence).

64. See NWPP, *supra* note 17, *Letter from B.S.M. to Alice Paul* (Jan. 11, 1932, Series I, Group 2, Box 81) (stating that Mr. Roewer believed the *Welosky* case was not ready for appeal).

65. See NWPP, *supra* note 17, *Letter from Wiley to Alma Lutz* (Sept. 15, 1931, Series I, Group 2, Box 80) (stating that their attorney is eager to appeal the case, but they do not feel that they can finance it).

66. See NWPP, *supra* note 17, *Letter from M.L., Director of National Activities, The National Woman’s Party, to Josephine Casey* (Sept. 26, 1931, Series I, Group 2, Box 8) (stating that although funds were low, work would continue in the organization).

67. See NWPP, *supra* note 17, *Letter from B.S.M. to Alice Paul* (Jan. 11, 1932, Series I, Group 2, Box 81) (stating that the Massachusetts National Woman’s Party took on the case for publicity); see also NWPP, *supra* note 17, *Unsigned to Alma Lutz* (Sept. 30, 1931, NWPP, Series I, Group 2, Box 80) (suggesting that Lutz contact other woman’s organizations to help in appealing the *Welosky* case).

68. NWPP, *supra* note 17, *Letter from Wiley to Alma Lutz* (Sept. 30, 1931, Series I, Group 2, Box 80).

of Alice Paul, decided on a basic strategy.<sup>69</sup> It resolved to approach other groups interested in “jury service by women,” to seek financing and legal assistance.<sup>70</sup> The party was also determined to keep costs low by getting free legal talent from within the organization or through donated time.<sup>71</sup> Moreover, behind the whole appeal lay the constant attempts to gain publicity from the case.<sup>72</sup>

Finding a lawyer and financing proved difficult. The party sounded out Roewer to see if he would “contribute his time in this appeal.”<sup>73</sup> His asking for a fee<sup>74</sup> prompted the party to look within its own organization for counsel to write briefs and argue the case. Matthews, who usually argued cases for the party, refused to undertake the task;<sup>75</sup> similarly Rebekah Greathouse refused the opportunity. Considering that both these women were stretched thin in both their professional and party activities and that some in the party thought there was little chance in legal victory, it should be no surprise that they refused to take the case. So the party turned to Gail Laughlin, a member of the Maine branch who practiced law in Portland.<sup>76</sup> Other women’s organizations—including the National Association of Women Lawyers, the National League of Women Voters, the Federation of Business and Professional Women, the General Federal of Women’s Clubs, and the American Association of University Women<sup>77</sup>—refused financial aid, though some would

69. See NWPP, *supra* note 17, *Letter from Wiley to Alma Lutz* (Sept. 30, 1931, Series I, Group 2, Box 80) (discussing a strategy involving (1) funding for the appeal through other women’s organizations, and (2) retaining an attorney in Massachusetts to handle the preparation of the required papers for the appeal).

70. See NWPP, *supra* note 17, *Letter from Unsigned (Wiley) to Alma Lutz* (Sept. 30, 1931, Series I, Group 2, Box 80) (asking Lutz to inquire with other women’s organizations regarding legal representation for appealing the case to the Supreme Court).

71. See NWPP, *supra* note 17, *Letter from Unsigned (Wiley) to Alma Lutz* (Sept. 30, 1931, Series I, Group 2, Box 80).

72. See NWPP, *supra* note 17, *Letter from Unsigned (Wiley) to Alma Lutz* (Sept. 30, 1931, Series I, Group 2, Box 80) (stating that “the Massachusetts Branch had taken the case for publicity purposes. A successful outcome had not been accepted.”).

73. See NWPP, *supra* note 17, *Letter to Alma Lutz, from (unsigned)* (Oct. 9, 1931, Series I, Group 2, Box 80) (saying that [unsigned author] wrote a letter to Mr. Roewer asking him to contribute his time to the case).

74. See NWPP, *supra* note 17, *Letter from George E. Roewer to Burnita Shelton Matthews* (Oct. 16, 1931, Series I, Group 2, Box 80) (discussing his fee for taking the case).

75. See NWPP, *supra* note 17, *Letter from Matthews to Mildred V. Palmer* (Oct. 24, 1931, Series I, Group 2, Box 80) (writing that Matthews will not handle the appeal but Rebekah Greathouse was considering it).

76. See NWPP, *supra* note 17, *Letter from Chairman of the National Council of the National Woman’s Party to Gail Laughlin* (Nov. 5, 1931, Series I, Group 2, Box 80) (asking Laughlin to argue the *Welosky* appeal to the U.S. Supreme Court).

77. See NWPP, *supra* note 17, *Letter from Chairman of the National Council of the National of the National Woman’s Party to Gail Laughlin* (Nov. 5, 1931, Series I, Group 2, Box 80) (listing the organizations that the National Women’s Party asked to help with the *Welosky* case).

ultimately file amicus curiae briefs before the Court.<sup>78</sup>

While the party believed “[i]t will be a great victory if we establish the right of women to serve on juries under the Fourteenth Amendment,” it also saw the appeal as a way to keep the issue before the public.<sup>79</sup> After the Massachusetts high court defeat, Lutz urged the national headquarters to take advantage of the opinion: “Will you please ask Muna Lee if she can get us some publicity in other papers and won’t you comment on it for the press.”<sup>80</sup> The party possessed a savvy awareness of how to use the media. Thus in reply to Lutz’s request for publicity from the case, Wiley pointed out that their paper, *Equal Rights*, had already printed an article, further she told Lutz that she had “given your message to Muna Lee about getting publicity.” She also gave Lutz advice on getting publicity: “As you know once the news has been in a paper, it has to be dished up in a different way to get it in again.”<sup>81</sup>

Also members of the party sought to publicize the issue in support of state legislation efforts for jury service.<sup>82</sup> The party advised “women lawyers from D.C. and other women who have served on juries” to “keep this jury service question alive for a bit.”<sup>83</sup> The party also worked to use the radio to carry its message on jury service to the public. “To make this talk as newsy as possible,” Sarah Pell worked the pending appeal and the name of the party’s female lawyer into her radio speech on the topic.<sup>84</sup> And Muna Lee congratulated her on

78. See NWPP, *supra* note 17, Letter from Ruth Hasting, Secretary of the Committee of the Legal Status of Women, National League of Women Voters, to Burnita Shelton Matthews, National Women’s Party (Nov. 3, 1931, Series I, Group 2, Box 80) (refusing to take party in the *Welosky* appeal); see also NWPP, *supra* note 17, Letter from Belle Rankin, Headquarters Secretary, American Association of University Women, to Mrs. H.W. Wiley, Chairman, National Council of the National Women’s Party (Nov. 23, 1931, Series I, Group 2, Box 81 (refusing to take part in the *Welosky* appeal).

79. NWPP, *supra* note 17, Letter from Alma Lutz to Matthews (Sept. 12, 1931, Series I, Group 2, Box 80).

80. See NWPP, *supra* note 17, Letter from Alma Lutz to Matthews (Sept. 12, 1931, Series I, Group 2, Box 80).

81. See NWPP, *supra* note 17, Letter from Wiley to Alma Lutz (Sept. 22, 1933, Series I, Group 2, Box 80).

82. See NWPP, *supra* note 17, Letter from Edith Houghton Hooker, Editor-in-Chief, *Equal Rights*, to Muna Lee (Oct. 17, 1931, NWPP, Series I, Group 2, Box 80) (writing to discuss asking a wealthy Maryland legislator to write an article in support of jury service for women).

83. See NWPP, *supra* note 17, Letter from Smith to Muna Lee (Nov. 11, 1931, Series I, Group 2, Box 80).

84. See NWPP, *supra* note 17, Letter from Mildred V. Palmer, Executive Secretary, National Women’s Party, to Burnita Matthews (Oct. 13, 1931, Series I, Group 2, Box 80) (asking who is arguing the *Welosky* case so that Pell can mention the name of the attorney in her radio address); see also NWPP, *supra* note 17, Letter from Mildred V. Palmer to Burnita Matthews (Oct. 28, 1931, Series I, Group 2, Box 80) (assuring Matthews that Pell would mention the name of the *Welosky* case attorney in her radio address); NWPP, *supra* note 17, Letter from B.S.M. to Mildred V. Palmer (Nov. 2, 1931, Series I, Group 2, Box 80) (encouraging Pell to discuss women’s jury service on the radio).

the “brilliant way in which you dealt with the question of jury service over the radio. I am sure that such talks as these will have a great effect in concentrating public opinion.”<sup>85</sup> The focus on public opinion reveals the party’s multiple goals in bringing the appeal.<sup>86</sup>

As soon as Laughlin had agreed to handle the appeal, the party began making her part of its publicity campaign. Muna Lee wrote to Laughlin that she would “like to get out a story to every daily newspaper in Maine with the announcement that you are going to do this.”<sup>87</sup> Lee told Laughlin of the “great amount of publicity on the general announcement of the appeal.”<sup>88</sup> She added that the case would be “made a big feature of” in the December, 1931 party convention.<sup>89</sup> Laughlin was highlighted in the party’s press releases to the *Washington Herald* before the convention and gave a “ringing address” on the case at the convention.<sup>90</sup>

Relying on Roewer and Lutz to do the legwork in filing a basic brief, and drawing upon the writing skills of Greathouse and others, Laughlin drafted an amicus curiae brief for the party.<sup>91</sup> The brief focused on the federal issue, utilizing the construction of the Fifteenth Amendment, the Party alleged that by being tried by a jury “chosen from a list from which members of her own sex were excluded” denied Welosky equal protection of the law under the Fourteenth Amendment.<sup>92</sup> By raising the Fourteenth Amendment’s

85. See NWPP, *supra* note 17, *Letter from Muna Lee, Director of National Activities, National Women’s Party, to Mrs. Stephen Pell* (Nov. 13, 1931, Series I, Group 2, Box 80) (congratulating Pell on her radio address).

86. See NWPP, *supra* note 17, *Letter to Gail Laughlin from Muna Lee, Director of National Activities, National Women’s Party* (Nov. 11, 1931, Series I, Group 2, Box 80) (discussing publicizing her decision to argue the *Welosky* appeal).

87. See NWPP, *supra* note 17, *Letter to Gail Laughlin from Muna Lee, Director of National Activities, National Women’s Party* (Nov. 11, 1931, Series I, Group 2, Box 80) (discussing publicizing her decision to argue the *Welosky* appeal).

88. See NWPP, *supra* note 17, *Letter to Gail Laughlin from Muna Lee, Director of National Activities, National Women’s Party* (Nov. 11, 1931, Series I, Group 2, Box 80).

89. See NWPP, *supra* note 17, *Letter to Gail Laughlin from Muna Lee, Director of National Activities, National Women’s Party* (Nov. 11, 1931, Series I, Group 2, Box 80); see also NWPP, *supra* note 17, *Letter from Muna Lee, Director of National Activities, National Women’s Party* (Nov. 23, 1931, Series I, Group 2, Box 81) (writing that a speech regarding the necessity of the *Welosky* appeal would occur during the convention dinner); NWPP, *supra* note 17, *Telegram from Muna Lee to Gail Laughlin* (Dec. 2, 1931, Series I, Group 2, Box 81) (explaining that Laughlin’s absence at the convention would be disastrous because she had been “heavily featured in all the publicity”).

90. See NWPP, *supra* note 17, *Letter from Muna Lee, Director of National Activities, National Women’s Party, to Gail Laughlin* (Dec. 8, 1931, Series I, Group 2, Box 81) (writing to thank Laughlin for her speech at the convention).

91. See Pardo, book reference guide, *supra* note 17, at 56 (stating that in January 1932, the United States Supreme Court permitted the National Woman’s Party and the National Association of Women Lawyers to file amicus curiae briefs for the *Welosky* case).

92. NWPP, *supra* note 17, *Amicus Curiae Brief, National Woman’s Party, Commonwealth v.*

Equal Protection Clause, the party confronted the language in the 1881 case of *Strauder v. West Virginia*,<sup>93</sup> that allowed discrimination as to who may be jurors.<sup>94</sup> “It may confine the selection to males, to free-holders, to citizens, to persons within certain ages, or to persons having education qualification. We do not believe the Fourteenth Amendment was ever intended to prohibit this. . . . Its aim was against discriminations because of race or color.”<sup>95</sup> The Party argued that the Fourteenth Amendment’s language was “no longer pertinent” because the Nineteenth Amendment and other changes in the law (recognized by the Court in *Adkins v. Children’s Hospital*<sup>96</sup>) had lifted the “ancient inequality of the sexes.”<sup>97</sup> Since women’s contractual, political, and civil status had changed no reasonable reason for excluding them from jury service existed.<sup>98</sup>

Their brief failed to move the Supreme Court, and on January 11, 1932 the Court denied certiorari in the case.<sup>99</sup> Given its multiple goals, the legal defeat was not disastrous for the party. On January 23, 1932, Matthews explained to Paul, the benefits of the case: “We had publicity throughout the country . . . on taking the case” to the Court, “on the official appearance of the Woman’s Party and the Women Lawyers as friends of the Court,” and “on the denial of the petition.”<sup>100</sup> Moreover, the denial of certiorari by the Supreme Court, did not stop the party’s use of the case for publicity purposes and to advance its standing agenda—legislative solutions or a federal equal rights amendment.<sup>101</sup> After all, the denial meant that the Massachusetts court’s opinion stood, which provided a reason for pushing the other tactics. First, the ruling prompted comment: “We have had clippings about the case from every section of the

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*Welosky*, (Series V).

93. 100 U.S. 303 (1879).

94. See *Strauder*, at 310 (describing that a state may discriminate on the basis of gender, alienage, age, and educational abilities).

95. *Id.*; see also Microfiche, *supra* note 17, *Amicus Curiae Brief, National Woman’s Party, Commonwealth v. Welosky*, (NWPP, Series V).

96. 261 U.S. 525 (1923).

97. Microfiche, *supra* note 17, *Amicus Curiae Brief, National Woman’s Party, Commonwealth v. Welosky*, (NWPP, Series V). See *Adkins* 261 U.S. at 553 (stating that the inequality of the sexes has almost come to a vanishing point due to the Nineteenth Amendment).

98. See NWPP, *supra* note 17, *Brief of National Woman’s Party as Amicus Curiae, Commonwealth v. Welosky*, 4-12 (Series V).

99. See 284 U.S. 684 (1932) (denying certiorari to *Welosky*).

100. See NWPP, *supra* note 17, *Letter to Alice Paul from Burnita Matthews* (Jan. 23, 1932, Series I, Group 2, Box 82) (discussing in general the benefits of the *Welosky* case).

101. See NWPP, *supra* note 17, *Letter to Alice Paul from Burnita Matthews* (Jan. 23, 1932, Series I, Group 2, Box 82) (stating that the decision to deny certiorari would not hinder the National Women’s Party’s other efforts).

Country.”<sup>102</sup>

The advantage in terms of the party’s message was obvious. Thus, at the very conclusion of the Welosky case, the party attempted to keep the topic before the public by trying to turn one of the most sensational trials of the early twentieth century into a jury service case. Sarah Pell telegraphed the Party, urging that it “take a stand on Fortescue Case Hawaii Demand She be Tried by Jury of Her Peers.”<sup>103</sup> The Fortescue/Massie case of 1932, generated world-wide publicity because of its lurid details, prominent defendants, and racial implications.<sup>104</sup> Thalie Massie, the wife of Navy officer Thomas H. Massie, and daughter of Washington socialite Grace Fortescue claimed to have been raped by five men.<sup>105</sup> Four men—none of whom were white—were put on trial for the crime.<sup>106</sup> After the jury failed to reach a verdict Massie and two sailors, with the assistance of Fortescue, kidnapped one of the men, forced a confession out of him, and killed him.<sup>107</sup> Fortescue, Massie, and the two sailors were charged with murder.<sup>108</sup> At this point Pell suggested the party intervene.<sup>109</sup>

The party worked very quickly, but its actions did not lead to its intervention in the case.<sup>110</sup> Within two days of Pell’s telegram, the council of the party, following the legal advice of Berrien, authorized

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102. See NWPP, *supra* note 17, *Letter to Alma Lutz from Burnita Matthews* (Jan. 16, 1932, Series I, Group 2, Box 82) (describing the great deal of publicity the *Welosky* case generated for the National Women’s Party).

103. See NWPP, *supra* note 17, *Telegraph to National Women’s Party from Sarah Pell* (Jan. 15, 1932, Series I, Group 1, Box 28) (stating Pell’s suggestion that the Party take a stand in the Fortescue case).

104. See IRVING STONE, CLARENCE DARROW FOR THE DEFENSE 502 (noting that the killing, arrest, and murder charges against Lieutenant Massie, Mrs. Fortescue, and the two sailors immediately became a “cause célèbre,” was made a major issue in Congress, and was heralded in major newspapers as far away as Budapest); see also PETER VAN SLINGERLAND, SOMETHING TERRIBLE HAS HAPPENED (New York: Harper & Row, 1966).

105. See CLARENCE DARROW, THE STORY OF MY LIFE 461-63 (1996); KEVIN TIERNEY, DARROW: A BIOGRAPHY 406-7 (1979); ATTORNEY FOR THE DAMNED: CLARENCE DARROW IN THE COURTROOM 103-5 (Arthur Weinberg ed., Chicago Press 1989) (describing the facts which led to the Fortescue case).

106. See STONE, *supra* note 104, at 500-01 (stating that Mrs. Massie identified two Hawaiians, one Chinese, and two Japanese men as the assailants).

107. Weinburg, *supra* note 105, at 103-05.

108. Weinburg, *supra* note 105, at 103-05.

109. See NWPP, *supra* note 17, *Telegraph to National Women’s Party from Sarah Pell* (Jan. 15, 1932, Series I, Group 1, Box 28) (stating Pell’s suggestion that the Party intervene in the Fortescue case and demand Grace Fortescue be tried by a jury that includes women).

110. See NWPP, *supra* note 17, *Letter to Mrs. Stephen Pell (Sarah Pell) from Elsie Hill* (Jan. 18, 1932, Series I, Group 2, Box 28) (replying that the National Women’s Party was unable to intervene in the Fortescue case).



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Elsie Hill to confer with the Fortescue family.<sup>111</sup> At this meeting, held the next day, the party suggested that Grace Fortescue's family urge Grace to challenge the jury array, provided them with cookie-cutter constitutional arguments on female jury service, and asked them to secure the approval of the party's entry into the case by her counsel.<sup>112</sup> Instead of being represented by the party at trial or raising a constitutional appeal, Fortescue relied on an aged Clarence Darrow and on his assistant, Wall Street lawyer George Leisure. However, the high powered legal talent failed to secure an acquittal for any of the defendants. All the defendants were convicted of manslaughter, but the governor commuted their sentences.<sup>113</sup> The denouement in the Fortescue case ended any chance for the party to bring a constitutional case that would generate any more publicity than the case of an obscure Boston bootlegger. Three years later, a dramatic case from Virginia gave the Party a chance to again seize the headlines on the jury service issue. In November 1935, Edith Maxwell was tried and convicted for having beaten her father to death with a high heeled shoe.<sup>114</sup> As required by Virginia law, she was tried by a jury of men. The case arose from Appalachia, which for the previous thirty years had been the subject of much popular myth about mountaineers and moonshining.<sup>115</sup> The press soon made Maxwell's story a national one and perpetuated all the mountaineering stereotypes in its coverage of the case.<sup>116</sup> One typical account called the case a "dramatic struggle between the archaic family codes of the mountains and the encroaching freedom of modern youth."<sup>117</sup>

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111. See NWPP, *supra* note 17, *Letter to Mrs. Stephen Pell (Sarah Pell) from Elsie Hill* (Jan. 18, 1932, Series I, Group 2, Box 28) (describing how Elsie Hill was authorized to meet with Grace Fortescue's family and detailing the results of that meeting).

112. See NWPP, *supra* note 17, *Letter to Mrs. Stephen Pell (Sarah Pell) from Elsie Hill* (Jan. 18, 1932, Series I, Group 2, Box 28) (providing details of suggestions that Elsie Hill gave to the Fortescue family regarding Grace Fortescue's case).

113. See CLARENCE DARROW: A SENTIMENTAL REBEL 371 (1980) (Arthur & Lila Weinburg, eds.) (recounting the Court's sentence to ten years at hard labor, and the governor's almost immediate decision to commute their sentences to time served).

114. See GARY DEAN BEST, WITCH HUNT IN WISE COUNTY: THE PERSECUTION OF EDITH MAXWELL 39-41 (1994), and Virginius Dabney, *Edith and Her Pappy*, NEW REPUBLIC 69 (Feb. 26, 1936) (both describing the facts of the case and the involvement of the media); see also Sharon Hatfield, "The Mountain Girl Who Went Modern: The Media's Crusade to Free Edith Maxwell," (M.A. Thesis: Ohio Univ. 1991) (providing a general recounting of the case, trial, and media involvement).

115. See generally BEST, DABNEY & HATFIELD, *supra* note 114 (outlining some of the stereotypes of Appalachia and their impact on the trial through the media).

116. See generally BEST, DABNEY & HATFIELD, *supra* note 114 (discussing the influence of the press on the *Maxwell* case).

117. BEST, *supra* note 114, at 40.

This press coverage caused several other organizations to be brought into the case, including the Woman's Party. Elsie Graff, president of the Virginia branch, wrote to Alice Paul enclosing a clipping about the Maxwell case and suggesting that the Party intervene.<sup>118</sup> Through Greathouse, the Party responded proposing to gain press notice regardless of whether they intervened in the case or not. Greathouse pointed out that the 1935 conference resolutions included one section, "demanding by all women of the immediate passage of the Equal Rights Amendment which should assure among other things that men and women throughout the U.S. shall be tried by juries composed of both sexes."<sup>119</sup> The intimation was that the party could use commentary on the Maxwell case to broadcast its message. Beyond generating publicity, Greathouse authorized Graff to "get a reliable report as to the intentions of Miss Maxwell's lawyers and their attitude toward possible assistance from us. Probably the only way this could be done would be to send a person to call on the lawyers, and of course, I do not know whether this would be worth the expense involved. Be sure to keep us advised of any further developments."<sup>120</sup>

The lure of the case was strong. Virginia, which had refused to ratify the Nineteenth Amendment, also refused to extend jury service to women. A state law of 1919 limited jury service to "[a]ll male citizens over twenty-one years of age" who had been residents of the state for two years, and of their county, city, or town for one year.<sup>121</sup> Juries were picked by jury commissioners and appointed only from those competent for jury service. In the 1920s, a state judge ruled that women were not competent jurors under Virginia law.<sup>122</sup> Through legislation, the Party tried to change this law and even if that failed, it thought that press coverage on the issue would help its

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118. See NWPP, *supra* note 17, *Letter from Rebekah S. Greathouse to Elsie Graff* (Dec. 3, 1935, Series I, Group 12, Box 96) (writing to thank Elsie Graff for press clippings on the Maxwell case).

119. See NWPP, *supra* note 17, *Letter from Rebekah S. Greathouse to Elsie Graff* (Dec. 3, 1935, Series I, Group 12, Box 96) (mentioning the National Women's Party's Resolution which was passed in the 1935 conference); *Biennial conference of the National Women's Party Convention at Columbus, Ohio, Report on Committee Resolutions* (Nov. 30-Dec. 1, 1935, NWPP, Series I, Group 9, Box 32).

120. See NWPP, *supra* note 17, *Letter from Rebekah S. Greathouse to Elsie Graff* (Dec. 3, 1935, Series I, Group 12, Box 96).

121. See NWPP, *supra* note 17, *Women's Research Foundation, "Status of Women Under the Laws of Virginia in 1925,"* 95-96 (Series I, Group 5, Box 205).

122. See NWPP, *supra* note 17, *Women's Research Foundation, "Status of Women Under the Laws of Virginia in 1925,"* 95-96 (Series I, Group 5, Box 205) (describing how Virginia Judge, James McClemere had ruled that women were not competent to be jurors).

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cause.<sup>123</sup> Beyond state law, Maxwell's case could also fit into the program for the Equal Rights Amendment.<sup>124</sup> Just when the party began exploring entering the *Maxwell* case, a prominent member delivered a radio address saying that the nation needed an Equal Rights Amendment because states still existed, "where women have not the right to serve on juries and if tried are tried by juries composed solely of men."<sup>125</sup>

Not only had the publicity value of the *Maxwell* case attracted the party to the case, but also, since the *Welosky* case, the Court in *Powell v. Alabama* had used the Fourteenth Amendment to strike against racial exclusion from jury pools. The confluence of publicity and changed constitutional circumstances was irresistible. The advantages of winning the case were obvious, but, upon losing, the party could utilize a wonderful propaganda example. "Surely if the Court so recently upheld the principle that negro men are denied their rights when their race is excluded from juries, but agreed that women are not denied their rights under the same circumstances, women would be more alive to the need for the Amendment."<sup>126</sup>

Thus, the party approached Maxwell and her lawyers and received their written permission to join in the motions for new trial.<sup>127</sup> Failing that appeal, Gail Laughlin traveled to Wise County, Virginia and argued the party's position on why the trial by a jury composed of all men violated the Fourteenth Amendment's equal protection guarantee. Laughlin recycled her argument in *Maxwell* from her argument in the *Welosky* case, thereby generating considerable savings for the party.<sup>128</sup> In *Maxwell*, saving funds was of less importance,

123. See NWPP, *supra* note 17, *Letter to Marion T. Read from Burnita Matthews* (Feb. 9, 1932, Series I, Group 3, Box 28) ("Whether or not there is any chance for the Jury Bill, a hearing before the Senate would help to educate not only the Committee but the public as well.").

124. See BEST, *supra* note 114, at 79 (explaining the National Woman's Party's argument that to solve the problem of Maxwell not being tried by a jury of her peers, Congress should pass the Equal Rights Amendment to guarantee women the right to sit on juries).

125. NWPP, *supra* note 17, *Helen Hunt West, 'The Equal Rights Campaign'* (WSJV Radio Broadcast, Dec. 8, 1935, Box 192); *Letter from Matthews to Hooker* (Feb. 2, 1932, Series I, Group 3, Box 82); *Letter from Read to Matthews* (Feb. 8, 1932, Series I, Group 3, Box 82); *Letter from Matthews to Read* (Feb. 9, 1932, NWPP, Series I, Group 3, Box 82). See also NWPP, *supra* note 17, *Women's Research Foundation, Series of Women Under the Laws of Virginia, 95-96* (1925, Series I, Box 205).

126. NWPP, *supra* note 17, *Letter from Ruth G. Williams to Hilles* (Dec. 4, 1935, Series I, Box 95).

127. See BEST, *supra* note 114, at 126 (stating that the National Woman's Party tendered Maxwell offers of legal and financial assistance); see *id.* at 142 (describing the presence and impact of attorney Gail Laughlin from the National Woman's Party on Maxwell's second trial).

128. See BEST, *supra* note 114, at 142 (characterizing Laughlin's argument and the Court's response); see also *Welosky*, 177 N.E. at 658 (describing defense challenge based on the fact that no women were on the lists from which the jurors were drawn).

because the party successfully used the case to appeal to its members and the public to support the cause of Edith Maxwell. It inaugurated a dime box campaign of public appeals known as, "Give a Dime For Justice."<sup>129</sup>

The trial judge refused to grant a new trial, so Maxwell's lawyers appealed to the Virginia Supreme Court of Appeals.<sup>130</sup> First, they brought up the constitutional issue that she was denied a jury of her peers because women could not serve on Virginia juries. Second, they argued new evidence. In September 1936, the Court overturned Maxwell's conviction on the grounds that "the evidence was insufficient to sustain a verdict of murder in the first degree."<sup>131</sup> Maxwell's new trial was scheduled for December 1936. The second trial of Edith Maxwell, "whose name is almost as familiar to Americans as hill-billy music,"<sup>132</sup> opened with Laughlin again laying the groundwork for appeal by arguing that Maxwell was denied a fair trial because of the proscription of women from Virginia juries. Her other lawyers tried a new defense, that her blows had not caused her father's death.<sup>133</sup>

This defense worked little better than the first. The all-male jury found her guilty of second degree murder and sentenced her to twenty years in prison.<sup>134</sup> Maxwell's lawyers planned another round of reservations and appeals, apparently laying the groundwork for constitutional arguments by the party. At this point, Edith Maxwell jettisoned the National Woman's Party lawyers, asking them to withdraw.<sup>135</sup> In legal terms, the case for the party was then a complete failure.

Although she had dropped the feminists, this did not mean that the feminists had dropped Maxwell. The party made her the cornerstone in its campaign to try to change the Virginia law that prohibited women from jury service. As Graff wrote after the second trial, "I cannot conceive of a jury, consisting of both women and men which would have convicted this girl under the evidence submitted in

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129. EQUAL RIGHTS: INDEPENDENT FEMINIST WKLY., Mar. 21, 1936, at 18; *see also* Microfiche, *supra* note 17, *Letter from Graff to West* (Feb. 23, 1937, NWPP, Series I, Box 97); *Letter from Weed to Laughlin* (Feb. 21, 1936, NWPP, Series I, Box 97).

130. *See* BEST, *supra* note 114, at 134 (describing procedure and outcome of appeal).

131. *See* Maxwell v. Commonwealth of Va., 167 Va. 490, 497-500 (1936).

132. RICHMOND TIMES DISPATCH, Dec. 9, 1936, at 1.

133. *See* BEST, *supra* note 114, at 141; *see also* Hatfield, *supra* note 114, at 52-53 (recounting events of the second trial).

134. *See* BEST, *supra* note 114, at 150 (recounting the jury's sentence and Maxwell's reaction).

135. Richmond Times Dispatch, Feb. 24, 1937, at 1.

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this case.”<sup>136</sup> Indeed, in the party’s view, a loss was as good as a win. Greathouse explained this to Graff during the middle of the *Maxwell* case, pointing out that while women could gain jury service through “passing a special law for that purpose. . . ,” that “[t]hey could also be put on the jury by passage and ratification of the Equal Rights Amendment . . . . [T]he method of the National Woman’s Party is to accomplish results on a National scale rather than working on individual discriminations and that is the reason that we believe in spending what income we have on backing the Equal Rights Amendment . . . .” She continued, “[W]e have always hoped that if we brought a strong case to” the Court’s “attention it would consider it and hold that women could not be kept off juries any more than Negroes can . . . . However, as the law stands today, without such a decision of the Supreme Court we need the Equal Rights Amendment to put women on juries everywhere.”<sup>137</sup>

#### CONCLUDING ANALYSIS OF NATIONAL WOMAN’S PARTY LITIGATION STRATEGIES

By the end of the 1930s the National Woman’s Party’s court campaign for jury service had ended in legal failure. This gives us a different lens to use in looking at litigation campaigns. The lens of failure brings into sharper focus the multifaceted approach of cause-centered litigation. While such extra-legal purposes might violate the ABA code of professional conduct, we should not be blind to the fact that these purposes were central to the reformers seeking to use the courts for their own ends.<sup>138</sup> The lens of legal failure should make us focus on different parts of litigation campaigns. Thus, we should not merely measure their actions on a simple win/loss legal meter, but on the overall goals of their campaign. If we do that, we will see clearly that in this case the reformers accomplished one of their main goals. Certainly, the National Woman’s Party was unable to establish a federal right to jury service, but the Party did succeed in its second goal of broadcasting the idea of equal treatment under the law. Indeed, with minimal expenditure and effort the Party was able to broadcast its message nationwide; something seen as a success.<sup>139</sup>

136. NWPP, *supra* note 17, *Elsie M. Graff to Helen West* (Feb. 23, 1937, Series I).

137. NWPP, *supra* note 17, *Letter from Greathouse to Graff* (Jan. 3, 1936, Series I, Box 97).

138. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1999 ed.) (prohibiting extrajudicial communications by lawyers when it could affect an adjudicative proceeding).

139. While it is beyond the scope of this paper, another way of assessing the Woman’s party’s litigation campaign is to compare it to the contemporaneous and much more studied NAACP effort against segregation.

Mobilization of legal talent from within the organization contributed directly to this rhetorical and propaganda approach to the jury service litigation. Beyond the obvious demonstration that women lawyers could brief appellate cases at the highest levels, the party's reliance on its own resources allowed it a greater degree of freedom in choosing its constitutional arguments. For example, the party's brief in the *Welosky* case bristled with language that was clearly aimed at developing its non-legal points. It opened by stating the party's purpose as being "to secure for women complete equality with men under the law."<sup>140</sup> Later it asserted, "[i]n discussing the question as to whether or not women are prejudiced in being tried by juries composed entirely of men, the temptation is great to write a tract or satirical comedy."<sup>141</sup> Thus the party avoided the problem that had bedeviled its attempts to create equal rights laws and amendments from 1920 through 1923. Lawyers, law professors, and judges all had their opinions concerning the nature of the proposals resulting in significant changes to the party's proposals. As Joan Zimmerman writes, feminists "discovered that in order to convince judges that the laws they proposed were constitutional, they had to fit their proposals into structures of legal thought."<sup>142</sup> To master those structures of legal thought, the party needed its own legal talent. Indeed, during this time, Alice Paul began her legal training leading to her becoming a lawyer.<sup>143</sup>

Paul's pursuit of legal expertise reflected the growing predominance of a legal focus within the organization. Other party members, like Matthews, also embraced this legal focus. The party thus cultivated its own legal talent. And those members made the party more familiar with the structures of legal thought and with constitutional doctrine as enunciated by courts. The existence of a core of knowledgeable female lawyers at the center of the party allowed them to meld the conventional view of law to the Party's revolutionary call for equal treatment of the sexes.

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140. NWPP, *supra* note 17, *Brief of National Woman's Party As Amicus Curiae, Commonwealth v. Welosky*, 4-12 (Series V, Group 2).

141. NWPP, *supra* note 17, *Brief of National Woman's Party As Amicus Curiae, Commonwealth v. Welosky*, 4-12 (Series V, Group 2).

142. *See generally* Zimmerman, *supra* note 2.

143. *See* NWPP, *supra* note 17 (referencing *Brief of National Woman's Party, supra* note 98, at 2).